

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1390

Cir. Ct. No. 2012CV2420

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

AURORA CREDIT UNION, ENTERPRISE CREDIT UNION, FIRST CREDIT UNION, FOCUS CREDIT UNION, GLACIER HILLS CREDIT UNION, GUARDIAN CREDIT UNION, LANDMARK CREDIT UNION, MCU FINANCIAL CENTER CREDIT UNION, PRIME FINANCIAL CREDIT UNION, SHERWIN WILLIAMS CREDIT UNION, SOUTHSHORE CREDIT UNION, SUMMIT CREDIT UNION AND W.C.U.L. SERVICES CORPORATION,

PLAINTIFFS-RESPONDENTS,

TRUSTONE FINANCIAL FEDERAL CREDIT UNION,

PLAINTIFF,

v.

DAVID CHAPMAN, RICHARD JUNGEN, ELAINE E. JUNGEN, RICHARD MATTHEWS, MATTHEWS LIVING TRUST, JOHN DOE AND JANE DOE,

DEFENDANTS,

TIMOTHY CASEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Timothy Casey appeals from a circuit court order denying his motion to vacate a default judgment against him. For the reasons set forth below, we affirm.

¶2 The facts underlying this case were set forth in *AM Community Credit Union v. M&D Investment Co.*, No. 2013AP930, unpublished slip op. (WI App Mar. 19, 2014), and will not be repeated here. The procedural history relevant to Casey’s appeal is as follows. Casey was served with an amended summons and complaint on August 7, 2012. Pursuant to WIS. STAT. §§ 801.09(2)(a)1. and 802.06(1) (2013-14)¹ and the directive set forth in the amended summons, Casey’s answer was due twenty days after service. After allegedly conferring with other named defendants in the lawsuit and being informed that his interests were being taken care of by Central States Mortgage Company, the corporate entity or “investment group” at the heart of the lawsuit, Casey did not retain his own counsel or timely answer the amended complaint. On February 20, 2013, defendants who Casey alleges are similarly situated to him were dismissed from the lawsuit. On April 22, 2013, plaintiffs appealed to this court the order dismissing these defendants and then moved for a default judgment against Casey on August 5, 2013. Casey had not yet appeared or filed an answer to the amended complaint. Casey retained counsel and on August 20, 2013, filed a

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

motion for an enlargement of time to file an answer. On September 30, 2013, the court concluded Casey had not demonstrated excusable neglect for failing to file a timely answer and denied Casey's motion; the court then granted plaintiffs' motion for default judgment. Casey did not appeal.

¶3 On March 14, 2014, this court rejected the plaintiffs' appeal related to the dismissal of the other defendants, affirming that dismissal in *AM Community Credit Union*, No. 2013AP930, unpublished slip op. ¶1. On April 10, 2014, Casey filed a motion to vacate the default judgment against him pursuant to WIS. STAT. § 806.07(1)(f), (g) & (h), ultimately seeking dismissal of the plaintiffs' suit as to him on the ground that he is similarly situated to the defendants in *AM Community Credit Union*. After a hearing, the circuit court denied Casey's motion and he appeals.

¶4 We review a circuit court's decision on whether to vacate a default judgment for an erroneous exercise of discretion. *Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811 N.W.2d 756. We will not disturb the court's decision unless the court applied an improper legal standard or made a determination not reasonably supported by the facts of record. *Id.* "Because the exercise of discretion is so essential to the [circuit] court's functioning, we generally look for reasons to sustain discretionary determinations." *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610.

¶5 On appeal, Casey advances two arguments for relief. He first asserts that pursuant to WIS. STAT. § 806.07(1)(g), "it is no longer equitable that the judgment should have prospective application." Alternatively, Casey contends he is entitled to relief under § 806.07(1)(h), arguing that the "Court of Appeals decision affirming the dismissal of certain defendants from this lawsuit supports

Casey’s position that the default judgment taken against him is an unfair circumstance and that justice requires that he be either dismissed from this case or allowed to defend it.”²

¶6 On his first point, Casey maintains the circuit court erred in not vacating his default judgment pursuant to WIS. STAT. § 806.07(1)(g) because “[i]t would be wholly inequitable for a judgment to be maintained and enforced against Mr. Casey when the underlying action was a legal nullity and when certain defendant[s] were ultimately dismissed as a result of the nullity.” Casey notes that our supreme court held in *Connor v. Connor*, 2001 WI 49, ¶40, 243 Wis. 2d 279, 627 N.W.2d 182, that “[u]nder the clear language of [para. (g)], a change in circumstances is specifically contemplated which makes the judgment no longer equitable.” He argues that our *AM Community Credit Union* decision dismissing the other defendants constitutes such a change in circumstances. *Connor* is of no assistance to Casey.

¶7 WISCONSIN STAT. § 806.07(1)(g) provides:

Relief from judgment or order. (1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

....

(g) It is no longer equitable that the judgment should have prospective application.

² Before the circuit court, Casey also sought relief based upon WIS. STAT. § 806.07(1)(f). Because he does not seek relief on appeal based upon para. (f), we deem him to have abandoned that ground for relief and do not address it.

As the circuit court in this case properly noted, we have determined that para. (g) applies only to actions in equity. See *Nelson v. Taff*, 175 Wis. 2d 178, 188, 499 N.W.2d 685 (Ct. App. 1993). *Connor*, an equitable action decided eight years after *Nelson*, did nothing to undermine our holding in *Nelson*. Counsel for Casey agreed with the court at the hearing on his motion to vacate that the present action is an action at law, not in equity. Casey provides us with no authority superseding or overturning our decision in *Nelson*, and we are therefore bound by it. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (this court has no authority to overturn its own published opinions). Because this is an action at law, not in equity, § 806.07(1)(g) cannot save Casey, and the circuit court did not err when it denied Casey relief on this ground.

¶8 Casey also argues that the circuit court erred when it refused to vacate his default judgment pursuant to WIS. STAT. § 806.07(1)(h). We disagree.

¶9 WISCONSIN STAT. § 806.07(1)(h) provides that the circuit court “may relieve a party ... from a judgment” for “[a]ny other reasons justifying relief from the operation of the judgment.” “To determine whether a party is entitled to review under [§] 806.07(1)(h), the circuit court should examine the allegations accompanying the motion with the assumption that all assertions contained therein are true.” *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶34, 326 Wis. 2d 640, 785 N.W.2d 493 (quoting *Sukala*, 282 Wis. 2d 46, ¶10). “If the facts alleged constitute extraordinary circumstances such that relief may be warranted under para. (1)(h), a hearing must be held on the truth of the allegations.” *Id.* “Extraordinary circumstances are those where ‘the sanctity of the final judgment is outweighed by the incessant command of the court’s conscience that justice be done in light of *all* the facts.’” *Id.*, ¶35 (quoting *Sukala*, 282 Wis. 2d 46, ¶12). The circuit court, after determining the truth of the allegations and considering

other factors, then exercises its discretion on whether to grant relief from judgment, *id.*, ¶34 (citing *Sukala*, 282 Wis. 2d 46, ¶10), balancing between the competing values of finality and fairness in the resolution of the dispute, *Sukala*, 282 Wis. 2d 46, ¶12. “Judicious exercise of the circuit court’s authority by limiting § 806.07(1)(h) relief to only the most egregious circumstances promotes the balance between finality of judgments and fair judgments.” *Allstate Ins. Co. v. Brunswick Corp.*, 2007 WI App 221, ¶17, 305 Wis. 2d 400, 740 N.W.2d 888. The party seeking relief has the burden of proving extraordinary circumstances exist. *Sukala*, 282 Wis. 2d 46, ¶12.

¶10 The five factors a court must consider when balancing the finality and fairness issues are: (1) “Whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant”; (2) “whether the claimant received the effective assistance of counsel”; (3) “whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments”; (4) “whether there is a meritorious defense to the claim”; and (5) “whether there are intervening circumstances making it inequitable to grant relief.” *Miller*, 326 Wis. 2d 640, ¶36; *see also Sukala*, 282 Wis. 2d 46, ¶11 (affirming factors originally set forth in *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985)). In reaching its decision in this case, the circuit court thoughtfully applied the above five factors to Casey’s motion to vacate.

¶11 As to the first factor, the circuit court recognized that Casey did not have his “day in court” because of “the very nature of this being a default judgment,” but noted that “one could also argue that he did make a conscientious, deliberate and well-informed choice herein by choosing not to file an answer to

this particular complaint and wait[ing] until literally at the 11th hour before he took any legal action attempting to rectify the situation that he, himself, caused.” Related to the second factor, the court noted that Casey was represented by counsel once the plaintiffs filed their motion for default judgment, but was unrepresented prior to that. The court, however, also emphasized that “clearly [Casey] made the decision, for whatever reason, not to involve an attorney.”

¶12 On the third factor, weighing the importance of deciding the case on the merits versus the finality of judgments, the court again noted that there had been “no judicial consideration of the actual merits of this lawsuit as it relates to the plaintiffs versus Mr. Casey because of the very nature of this being a default judgment.” The court concluded, however, that rendering a decision on the merits in this case did not outweigh the importance of finality, noting that default judgment was entered against Casey because of “Mr. Casey’s decision to not act or not respond appropriately.” The circuit court next considered the fourth factor, the existence of a meritorious defense, and concluded that this factor favored Casey, noting that if Casey “had timely filed an answer and proceeded accordingly in this case” to include joining in the other defendants’ motion to dismiss, which was granted by the circuit court and affirmed on appeal, Casey “undoubtedly would have reaped the benefit of that appellate decision.”

¶13 Continuing its analysis, the circuit court specifically noted the fifth factor—“whether there are intervening circumstances making it inequitable to grant relief”—as being “significant.” The court recognized that our decision in *AM Community Credit Union* affirming the dismissal of the other defendants could be viewed as an intervening circumstance weighing in favor of granting Casey relief, but determined that this consideration carried less weight than the following:

If this court grants Mr. Casey's request, I believe that this is nothing more than an end-around from what this court had previously dealt with back on September 30, 2013 when the court concluded that there was no excusable neglect shown and therefore the court denied Mr. Casey's request to enlarge the time to file an answer that then on that same day resulted in a default judgment being granted against him.

If this court then allows him under these circumstances to then get vacated the default judgment that he previously sought similar type of relief, this is simply an end-around and I just don't believe that in all good conscious [sic] is warranted in these particular circumstances.

Those are intervening circumstances that make it inequitable to grant relief.

The circuit court then balanced the interests of all the parties, considering also "the balance between finality of judgments and fair judgments," and concluded that this case did not present "egregious circumstances" that would justify vacating the judgment against Casey.

¶14 Casey does not dispute that he failed to timely answer the complaint and did not even attempt to answer it until the plaintiffs moved for default judgment. Thereafter, the circuit court denied his motion to enlarge the time to file an answer and entered default judgment against him. Although represented by counsel at the time, he failed to appeal that judgment even though the circuit court had previously granted the other "similarly situated" defendants' motion to dismiss them from the action. Rather, Casey first requested WIS. STAT. § 806.07 relief only after this court affirmed the circuit court's order dismissing the other defendants. To grant Casey relief from the judgment under the circumstances of this case would be tantamount to extending the time period within which Casey could appeal the court's denial of his motion to enlarge time and its entry of default judgment in favor of the plaintiffs. Casey, again, while represented by counsel, chose not to appeal those decisions. We will not endorse his effort to use § 806.07 as a vehicle to essentially do an "end-around" the statutory time period to

appeal and de facto extend that time period by several months. As the circuit court recognized, finality requires that he not be rescued from the choices he has made and upon which the plaintiffs have no doubt relied.

¶15 In exercising its discretion, the circuit court applied the proper legal standard and considerations, and its decision is supported by the facts of record.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

